STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CHRISTINA FETTIG, SARAH L. FETTIG, SHAWN ANTHONY FETTIG, and STEVEN MICHAEL FETTIG, Minors.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

KATHLEEN McCLOSKEY, a/k/a KATHLEEN FETTIG,

Respondent-Appellant.

UNPUBLISHED
January 25, 2005

No. 256679
Grand Traverse Circuit Court
Family Division
LC No. 03-000645-NA

Before: Smolenski, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Respondent appeals as of right from an order of the trial court terminating her parental rights to her four minor children. We reverse and remand.

In May of 2003, petitioner petitioned the trial court for temporary custody based on allegations of physical abuse and inappropriate sexual contact between the children. At a dispositional hearing held on February 4, 2004, the trial court postponed the termination trial scheduled for that day to enable the issue of reunification to be assessed and evaluated. A new trial was scheduled for April 6, 2004. On the day of the termination trial, respondent and petitioner presented the court with a stipulation agreement to which the parties had agreed in lieu of proceeding with the trial. The stipulation agreement provided that respondent would sign a release of parental rights for each of her children, but that the releases would not be entered by the court unless, after a ninety-day evaluation, a therapist, identified in the agreement, determined that respondent did not have the skills and capacity to safely and appropriately parent and nurture the children. At the end of the ninety-day evaluation, the court held a progress review hearing and read the therapist's report. Based on the therapist's findings and the contingent releases signed by respondent, the court issued an order terminating respondent's parental rights.

On appeal, respondent contends that the trial court impermissibly failed to make the statutorily mandated findings of fact and conclusions of law necessary to terminate her parental rights. The question we must address is whether a trial court may delegate its statutory duties

enumerated above to a non-judicial party in a parental rights termination case. However, before we can address this question, we must first address the legal effect of the releases, if any.

Although there are no provisions within the juvenile code[1] governing the voluntary release of parental rights, this Court has held that a parent may voluntarily release his or her parental rights under the juvenile code, in which case the trial court need not articulate a statutory basis for the termination. *In re Toler*, 193 Mich App 474, 477; 484 NW2d 672 (1992). This holding was in contradistinction to the holding in *In re Buckingham*, 141 Mich App 828; 368 NW2d 888 (1985), which held that a release made at a pretrial hearing under the juvenile code, must comply with the requirements for releases under the adoption code, MCL 710.21, *et seq.* The *Toler* court differentiated the facts of its case from that of *Buckingham* by noting that in *Buckingham* the release was suggested by the trial court at a pretrial hearing, whereas in *Toler*, after 3 ½ days of testimony at a dispositional hearing, respondent agreed to terminate his parental rights in exchange for the dismissal of first and second-degree criminal sexual conduct charges against him. *Toler*, *supra* at 475, 477-478. The *Toler* court stated that the respondent conceded, "in effect that the court would be able to find statutory authorization for the termination and that termination would be in the best interest of the child." *Id.* at 478. In addition, the *Toler* court noted that the trial court specifically determined that the termination was in the best interests of the child. *Id.*

In the present case, the trial court did not conduct a termination trial, at which evidence could have been presented that would have enabled it to make findings of fact. Instead, the trial court took notice and approved of a stipulation agreement that the parties had prepared to serve in lieu of a trial.[2] The stipulation agreement provided that respondent would execute a release of parental rights for each child, but that these releases would not be operative unless the therapist determined that respondent was incapable of parenting her children. Because the releases in this case were contingent, we do not find them to be the concession that the trial court would make the requisite findings and, therefore, they were not a valid release of parental rights under the juvenile code as found in *Toler*. Moreover, even if the releases were executed pursuant to the adoption code, because they were subject to the contingency within the stipulation agreement, they violated the prohibition against releases that are subject to a collateral agreement. MCL 710.29(5). Consequently, the releases were not legally effective to terminate respondent's parental rights. Because the releases were not legally effective to terminate respondent's parental rights, the trial court could only have properly terminated respondent's parental rights by finding that one of the statutorily enumerated grounds for terminating respondent's parental

[1] See MCL 712A.1, *et seq.*

[2] The agreement does not appear be an *Adrianson* agreement. See *In re Adrianson*, 105 Mich App 300; 306 NW2d 487 (1981). Even if it were, this Court has recently ruled that *Adrianson* agreements violate the statute and court rules governing the termination of parental rights. See *In re Gazella Minors*, ___ Mich App ___; ___ NW2d ___ (2005). The *Gazella* Court held that *Adrianson* agreements are not valid because the trial court is required by statute to terminate parental rights once it has properly found that grounds for termination exist, unless it finds that the termination is clearly not in the best interests of the child, and may not, therefore, suspend the termination pursuant to an agreement. *Id.*

rights existed. Yet the trial court never made such findings, but rather relied solely upon the findings of fact made by the therapist.

Thus, whether the trial court properly terminated respondent's parental rights, depends on whether the parties could, through their stipulation agreement, circumvent the trial court's duty to make findings of fact by delegating that task to a third-party. We believe our Supreme Court's decision in *Harvey v Harvey*, 470 Mich 186, 193; 680 NW2d 835 (2004), is informative on this matter. In *Harvey*, our Supreme Court was presented with a case where the parties to a custody dispute had agreed to delegate the custody issue to a third-party, whose decision could not be reviewed by the trial court. *Id.* at 188-189. Our Supreme Court ruled that, because the Child Custody Act[3] required the trial court to determine the best interests of the children before entering an order resolving a custody dispute, the trial court must make that determination before entering such an order. *Id.* at 192. The Supreme Court concluded that permitting "the parties, by stipulation, to limit the trial court's authority to review custody determinations would nullify the protections of the Child Custody Act and relieve the circuit court of its statutorily imposed responsibilities." *Id.* at 194. Although this case involves the statutes governing the termination of parental rights, rather than the child custody act, we believe that the same logic governs here.

Michigan law provides that before a trial court may involuntarily terminate parental rights, it must find by clear and convincing evidence that one or more of the statutorily enumerated grounds for termination exists. MCL 712A.19b(3). *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003). Furthermore, the trial court must "state on the record or in writing its findings of fact and conclusions of law with respect to whether or not parental rights should be terminated." MCL 712A.19b(1); see also MCR 3.977(H)(3). If the trial court finds that one or more grounds for termination of parental rights exists, the trial court must order the termination of parental rights unless "the court finds that termination of parental rights to the child is clearly not in the child's best interests." MCL 712A.19b(5). These statutes make it clear that the trial court must make certain findings before terminating parental rights. Yet here, the trial court did not directly hear evidence or make its own findings of fact. Rather, at what was essentially a progress hearing, the trial court relied solely on the therapist's findings and the previously executed releases when it terminated respondent's parental rights. We find that this was an impermissibly abdication of the trial court's statutory duties. Because the releases were legally insufficient to by themselves terminate respondent's parental rights, and the trial court did not make its own findings of fact as required by MCL 712A.19b(1), respondent's parental rights were not properly terminated.

Reversed and remanded. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Richard A. Bandstra

[3] MCL 722.21, *et seq.*